
ABRAMS, GORELICK, FRIEDMAN & JACOBSON, P.C.

CASES AND POINTS

Volume III, Issue 3

Summer, 2001

O OPENING STATEMENT

In 1973, New York's Legislature enacted the Motor Vehicle Reparations Act ("No-Fault") which was intended to assure that injured persons were compensated for economic loss but that non-economic loss (pain and suffering) could be recovered only by those persons who had suffered serious injury. Enactment of the No-Fault Statute was an attempt to unclog the jammed dockets of New York's State Courts and to assist insurers and consumers, alike, by reducing the payments and defense expenses incurred by insurers and the premiums paid by motorists in New York.

While the overall effect of the No-Fault Statute upon automobile insurance premium rates is debatable, it is beyond dispute that the often confusing maze of Regulations interpreting the No-Fault Statute have given rise to a whole new body of litigation in the State Courts.

Our lead article summarizes some recent significant decisions of New York's Courts involving automobile liability insurance.

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AUTOMOBILE LIABILITY INSURANCE – RECENT SIGNIFICANT DECISIONS

By

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• **The "Permanent Loss of Use" Exception to the No-Fault Statute Applies Only to Total Loss of Use.**

On May 3, New York's Court of Appeals, in a unanimous decision, significantly limited permissible actions brought under the "permanent loss of use" exception to the No Fault Insurance Law.

In Oberly v. Bangs Ambulance, Inc., 2001 WL 463231, 2001 N.Y. Slip Op. 03711, New York's Court of Appeals squarely addressed the question of whether a party bringing a claim under the No-Fault serious injury category of "permanent loss of use of a body organ, member, function or system" is required to prove that the loss of use is significant or consequential. In Oberly, the Court unanimously concluded that only a total loss of use is compensable under the "permanent loss of use" exception to the No-Fault statute.

In Oberly, the plaintiff, a dentist, was injured while being transported in an ambulance owned by the defendant, Bangs Ambulance.

While enroute to the hospital in a Bangs Ambulance, plaintiff was lying face up on a stretcher with an IV needle in his arm, and a five pound IV pump was set up on a shelf above him. The ambulance struck a curb, causing the IV pump to fall from the shelf and land on his right arm. Plaintiff suffered bruising and

continues to complain of pain and cramping in his arm, which pain allegedly limits his ability to practice as a dentist.

Initially, plaintiff claimed that his injuries fell within all of the exceptions to the No Fault statute: significant disfigurement; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; and, significant limitation of use by a body function or system.

After discovery had been completed and the case was put on the trial calendar, defendant moved for summary judgment. In opposing the motion, plaintiff abandoned his initial claim that his injury fell within all of the serious injury standards except for the "permanent loss of use of a body organ, member, function or system" standard.

The Supreme Court dismissed plaintiff's action for lack of evidence that he had suffered a "serious injury". A divided Appellate Division (3 to 2) affirmed, ruling that the Statute requires a party claiming a partial loss of use of a body "organ or member" to show that the limitation is "consequential or significant" and that plaintiff had not met that threshold. The two dissenting Judges concluded that the nerve damage which plaintiff allegedly suffered could constitute a partial loss of use of a body "function or system" for

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which no proof of significance was required.

On appeal to the Court of Appeals, the plaintiff argued that the Statute does not require proof that a “permanent loss of use” of a body member is significant even if the loss is only partial. Plaintiff contended that the limitation of use of plaintiff’s arm qualifies it as a “permanent loss of use of a body member, body function and body system”.

The Court of Appeals unanimously disagreed.

In reaching its decision, the Court noted that as originally enacted, the Statute contained two categories of “serious injury”: 1) claims for death, dismemberment, significant disfigurement, certain types of fractures, permanent loss of use of a body organ, member, function or system; and, 2) claims for medical charges as the result of an injury that exceeded \$500. That Statute was amended in 1977 to define serious injury as: “a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the impairment”.

The Oberly Court reasoned that the No-Fault Statute was enacted by the Legislature to limit the number of lawsuits pending before the Courts arising out of minor injuries sustained in motor vehicle accidents. The statutory exceptions to the No-Fault bar to litigation were intended to permit only persons who suffered a

serious injury to recover their non-economic loss from the tortfeasor. However, until Oberly, attorneys representing parties who had sustained less than serious injuries have utilized the “permanent loss of use” exception to bring lawsuits for injuries which did not qualify under the other exceptions to the Statute because the injury was neither significant nor consequential. In Oberly, the Court of Appeals closed that loop-hole, with the expected result being the settlement of more claims without litigation and an increase in the number of serious injury “threshold” motions being granted to defendants.

**Burdens of Proof in meeting the serious injury “threshold”.
Herniated discs are not *per se* “serious injuries”.**

The question of the respective burdens of proof in “threshold motions” continues to be the subject of litigation and debate. A recent instructive decision of New York’s Appellate Division, Third Department, may go a long way in quieting that debate.

In *Rose v. Furgerson*, 721 N.Y.S.2d 873 (3rd Dept., 2001), the automobile which was being driven by the plaintiff was struck from behind by defendant’s vehicle. On the date of the accident, plaintiff drove himself home and his wife took him to the hospital. At the hospital he was x-rayed and given a neck brace to wear. He missed one day of work as a result of the accident. An MRI was performed approximately two months after the accident wherein the radiologist concluded that plaintiff showed evidence of bulging of the disc at the C5-6 level “without significant consequences” as well as a minimal degree of subligamentous extrusion at the C6-7 level with “no significant compromise of the canal in the midline”. After reviewing the MRI, plaintiff’s orthopedist diagnosed plaintiff as having a

flexion/extension to the cervical spine and herniated discs at C5-6 and C6-7.

After all discovery had been completed, defendant moved for summary judgment dismissing the Complaint on the ground that plaintiff had failed to meet the threshold of “serious injury”. Plaintiff cross-moved for summary judgment on the question of liability for the accident.

In deciding the motion, the Court explained the respective burdens of the parties and noted that the defendant had the initial burden of showing the plaintiff did not suffer a “serious injury” within the meaning of the Statute. The Court found that defendant met that burden by submitting the report of its orthopedist who conducted an independent medical examination of the plaintiff and had opined that the plaintiff’s cervical spine condition was of preexisting origin which could have been temporarily aggravated by the accident. The defendant also submitted the transcript of plaintiff’s deposition where he testified that after the accident he continued to play racquetball once or twice a week, although he could not compete with the same frequency or level of intensity that he did prior to the accident. Plaintiff testified that he also continued his participation in Tai Chi exercising on a regular basis, although with some discomfort. With respect to his employment as a teacher, he testified that he now sits more frequently while giving lectures. Plaintiff also testified that he was no longer taking any prescription medication, although he continued using ibuprofen for pain.

Having found that defendant had met her initial burden, the Court noted that it then became incumbent upon the plaintiff “to set forth the competent medical evidence based on objective medical findings to support his claim”.

In opposing the motion, plaintiff submitted proof of his examination and treatment at the Emergency Room, along with the MRI report and the various records of his orthopedist which indicated that plaintiff had herniated discs with accompanying physical symptoms.

Significantly, the Court held that herniated discs do not *per se* meet the statutory threshold of serious injury absent “objective evidence of the extent or degree of the alleged physical limitations resulting to the injured parties and their duration.”

The Court found that plaintiff’s orthopedist, although opining that plaintiff’s herniated discs were caused by the accident and that the condition was not pre-existing, did not specify any resulting loss or limitation of motion as the result of the accident. Moreover, the Court found that plaintiff’s Examination Before Trial testimony did not establish that he was prevented from performing substantially all of the material acts which constituted his usual and customary daily activities for 90 of the 180 days following the accident. The Court noted that it was necessary for plaintiff to demonstrate that his usual activities were curtailed “to a great extent rather than slight curtailment”.

Thus, the Court concluded that based upon its review of the medical evidence and plaintiff’s own testimony concerning the restrictions placed on his lifestyle as a result of his alleged injuries, it agreed with the defendant’s contention that plaintiff had failed to satisfy his burden of raising a triable question of fact that he had suffered a “serious injury” and modified the decision of the Trial Court and granted summary judgment to the defendant, dismissing the Complaint.

- **Two Courts hold that the serious injury requirement is an**

issue of liability rather than damages

In *Porter v. SPD Trucking*, 2001 WL 669872 [decided June 12, 2001], the First Department, relying on its prior holding in *Maldonado v. DePalo* (715 N.Y.S.2d 245), held that since serious injury is a necessary element of plaintiffs’ *prima facie* case that had to be pleaded in their complaint, the prior order granting plaintiffs a default judgment necessarily decided that had they sustained serious injuries, and, unless vacated, precluded defendants from asserting otherwise at the damages inquest. Only days earlier, Judge Lebowitz of the Richmond County Supreme Court held similarly, also basing his decision on the *Maldonado* case.

In *Zecca v. Riccardelli* [decided June 1, 2001], the Court was also faced with the issue of whether a default judgment deprives a defendant of its defense based upon New York’s Insurance Law § 5102 (the serious injury threshold). In that case, Judge Lebowitz noted that the issue had not been decided by the Court of Appeals or the Second Department, in which Richmond County is located. It had, however, recently been decided by New York’s First Department (in *Maldonado*) and thus, Judge Lebowitz felt bound to follow that decision.

The effect of these decisions is that if a judgment on liability is granted to plaintiff on a motion for judgment (whether on default or on the merits), the judgment operates as an admission that serious injury has occurred and thus, the defense is not available at the time of the damages hearing.

In *Zecca*, Judge Lebowitz cautioned:

“It has become common practice for attorneys and the Court alike to refer to liability in motor vehicle accidents cases without

regard to the threshold issue for serious injury. Serious injury is usually considered an aspect of damages. . . . The result, in practice, is that pre-trial summary judgment on liability includes the threshold issue of serious injury, but a jury verdict during the liability phase of a trial does not. This is so because in automobile cases, the liability phase of a bifurcated trial determines negligence issues only. The threshold question of serious injury is not answered until the damages phase of the trial. And in that phase of trial, if the jury does not first answer the No-Fault threshold question in the affirmative, the case is over because there is no liability. Therefore, when plaintiff moves for “summary judgment on the issue of liability”, all beware. . .”

As a practical matter, if defendants should always raise the question of “serious injury” in opposition to plaintiffs’ motions for summary judgment rather than risk losing the defense forever.

Other Decisions of Interest

- **Indirect liability suits for third-party economic loss are barred.**

On June 7, 2001, the Court of Appeals, in a decision with far-reaching effect, refused to recognize indirect liability for economic loss, absent a special injury unique from that suffered by the community at large.

532 Madison Avenue Gourmet Foods v. Finlandia Center, Inc.; *Fifth Avenue Chocolatiere, Ltd. v. 540 Acquisition Co., LLC.*; and, *Goldberg, Weprin & Ustin v. Tishman Construction Corp.* (___N.Y.2d___, 2001 WL 630056) all stemmed from building collapses which had

occurred in New York City. Those three cases, decided together, raised two novel issues: the scope of a landowner’s duty where the sole injury is economic; and, the viability of a public nuisance claim under the circumstances of those cases.

Two of the three cases (*Gourmet Foods* and *Fifth Avenue Chocolatiere*, arose out of a December 7, 1997 incident when a part of a brick wall of a thirty-nine story office building collapsed during renovation. As a result, New York City closed a fifteen block section of Madison Avenue between 42nd and 57th Street for two weeks.

Neither of the plaintiffs sustained any physical damage. However, they sued the owners and manager of the building seeking recovery for economic loss resulting from the street closure. Both of the suits were dismissed in Supreme Court but reinstated by the Appellate Division, First Department, in split 3 to 2 decisions.

The third case (*Goldberg, Weprin & Ustin*) stems from the July 1, 1999 collapse of a construction tower the Conde Nast Building in Times Square which resulted in the closure of local streets. Goldberg, Weprin, a law firm, sued for economic loss sustained as the result of the closing of the local streets. The First Department affirmed dismissal by the Supreme Court in that case on the ground that the nexus between the defendants activities and the alleges losses was “too tenuous and remote to permit recovery on any tort theory”.

In reversing the lower Court’s refusal to dismiss *Gourmet Foods* and *Chocolatiere* and affirming the dismissal of the Complaint in *Goldberg, Weprin*, the Court of Appeals recognized that although a duty may arise from a special relationship (for example, as between a landlord and its tenant and the

tenant’s visitors), it cannot be extended to the general public.

In writing the decision for the unanimous Court, Chief Judge Kaye observed that while the Court has held that a landowner has a duty to reasonably protect adjoining neighbors while engaging in activities that may cause injuries, “we have never held . . . that a landowner owes a duty to protect an entire urban neighborhood against purely economic losses”, and declined to do so in these cases.

The Court also rejected the public nuisance claims brought by the plaintiffs which were predicated on the theory that the accidents forced closure of their businesses and thus caused special damages beyond those suffered by the general public. In doing so, Chief Judge Kaye held that a public nuisance suit is viable only in cases where the offending conduct “amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public space or endangering or injuring the property, health, safety or comfort of a considerable number of persons”. Judge Kaye found in these cases, that the economic loss for public nuisance was felt by the entire community, albeit in different degrees, and therefore the plaintiffs’ injuries were not unique enough to sustain a claim.

- **Loss of multiple fingertips does not constitute a “grave injury” under Workers Compensation Law § 11**

In 1996, New York’s Workers Compensation Law was amended to prohibit third-party actions against employers of injured plaintiffs except in cases where the employee had suffered “grave injury”. Workers Compensation Law § 11 lists specific injuries including “loss of multiple fingers” as constituting grave injury.

In *Castro v. United Container Machinery Group*, ___N.Y.2d ___, 2001

WL 721399, plaintiff lost five fingertips (two from his right hand, three from his left), in an accident involving a dye-cutting machine which occurred while he was working for Southern Container Corp. The injury left the outermost joints of the fingers intact. Mr. Castro sued the manufacturer of the machine, United Container Machinery Group. United, in turn, brought a third-party action against plaintiff’s employer, Southern Container, seeking common law contribution and indemnification. Southern moved to dismiss the third-party complaint against it on the ground that Workers Compensation Law § 11 barred recovery. The Supreme Court denied the motion, finding questions of fact regarding the extent and nature of plaintiff’s grave injury. The Appellate Division reversed, holding that Southern was entitled to summary judgment, because plaintiff’s injury did not constitute “loss of multiple fingers” and therefore, was not a grave injury as a matter of law.

The Court of Appeals affirmed the dismissal, holding that the revised Statute required the complete loss of multiple fingers to be considered a “grave injury”, as a matter of law.

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